

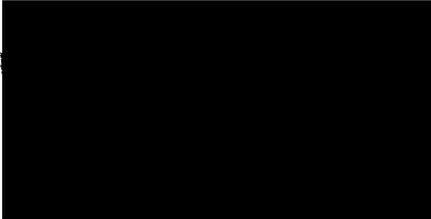
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
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U.S. Citizenship
and Immigration
Services

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BG

JUN 22 2005

Office: VERMONT SERVICE CENTER

Date:

EAC-03-117-52785

IN RE: Petitioner: [REDACTED]
 Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a vineyard. It seeks to employ the beneficiary permanently in the United States as a "farmer, (grape grower)". As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the experience required by the ETA 750, and denied the petition accordingly.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 19, 1999. The Form ETA 750 states that the position of farmer (grape grower) requires two years and six months of experience in the offered position or in the related occupation of "Sciences."

On the Form ETA 750B, signed by the beneficiary on March 19, 1999 the beneficiary claimed to have worked for the petitioner beginning in May 1994 and continuing through the date of the ETA 750B, in the position of grounds keeper.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The I-140 petition was submitted on January 31, 2003. On the petition, the petitioner claimed to have been established in January 1983, to currently have five employees, to have a gross annual income of \$400,000.00+, and to have a net annual income of \$150,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 11, 2003, the director requested additional evidence relevant to the beneficiary's experience and additional evidence relevant to the petitioner's ability to pay the proffered wage.

In response to the RFE, the petitioner submitted additional evidence. The evidence relevant to the beneficiary's experience included documents describing the beneficiary's work as a seaman and first mate on vessels in Russia, including four months of service in which his duties included serving as a research assistant to scientists on a research vessel.

In a decision dated September 2, 2003 the director determined that the evidence failed to establish that the beneficiary's experience in biology and chemistry obtained during his service as a captain first mate was relevant to the job offered of farmer (grape grower). The director therefore denied the petition.

On appeal, the petitioner submits a brief in the form of a letter dated September 25, 2003 from the petitioner's owner and additional evidence. The petitioner also submits duplicate copies of many documents which were previously submitted for the record. The petitioner states on appeal that the beneficiary's experience in biology and chemistry is highly relevant to the job offered.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, the documents newly submitted on appeal consist of a copy of a soil analysis report issued to the petitioner and copies of invoices for purchases made by the petitioner of plant and fertilizer products. None of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The evidence relevant to the beneficiary's qualifications includes a written statement of the beneficiary describing his work and studies as a seaman and captain first mate in Russia. The beneficiary states that beginning in February 1977 he worked as a seaman, that from October 1978 until June 1979 he followed a course of studies for ship captain mate, and that from May 1980 until June 1982 he served as a captain first mate. The beneficiary states that for the final four months of his service as a captain first mate, from February 1982 until June 1982, he served on a research vessel and that his duties included those of a research assistant to scientists on board who were performing biological research studies. Also submitted by the petitioner was a chronological work record of the beneficiary for the period from September 11, 1965 until April 1992, apparently issued by a government agency, with an official translation from Russian by the St. Petersburg Intourist office dated October 7, 1993.

The other documents in the record relevant to the beneficiary's experience consist of a copy of a soil analysis report dated October 25, 2000 issued to the petitioner, and copies of invoices dated May 1, 2001, July 7, 2003, July 23, 2003, and August 11, 2003, for purchases made by the petitioner of plant and fertilizer products, which are the documents submitted for the first time on appeal.

As noted above, the Form ETA 750 states that the position of farmer (grape grower) requires two years and six months of experience in the offered position or in the related occupation of "Sciences." The term "Sciences" is not defined in the ETA 750. That term is a broad term. According to an online dictionary at the Internet web site of Merriam-Webster, Inc., the word "science" has the following meanings:

1 : the state of knowing : knowledge as distinguished from ignorance or misunderstanding, **2 a** : a department of systematized knowledge as an object of study <the *science* of theology> **b** : something (as a sport or technique) that may be studied or learned like systematized knowledge <have it down to a *science*>, **3 a** : knowledge or a system of knowledge covering general truths or the operation of general laws especially as obtained and tested through scientific method **b** : such knowledge or such as system of knowledge concerned with the physical world and its phenomena : NATURAL SCIENCE [hyperlink] **4** : a system or method reconciling practical

ends with scientific laws <culinary science>, 5 capitalized : CHRISTIAN SCIENCE [hyperlink].

Merriam-Webster, Inc., *Merriam-Webster Online*,” <http://www.m-w.com>; *search* Dictionary for “sciences” (June 16, 2004) (producing definition of “science”).

The petitioner presumably intended the term “Sciences” on the ETA 750 to have a meaning similar to that in definition 3b quoted above, relating to knowledge concerned with the physical world and its phenomena. But even that meaning would encompass a range of disciplines, including not only biology and chemistry, the two fields mentioned in the petitioner’s evidence, but also fields as diverse as astronomy, geology and physics.

Since the term “Sciences” is so broad, any interpretation of its meaning with regard to the instant petition must consider the way that that term is used on the ETA 750, namely as a “related occupation” to the offered job of farmer (grape grower). Fields of science which are related to the offered job therefore would be included, but fields of science which are not related to the offered job must be excluded.

In the instant petition, the only work experience of the beneficiary in a scientific field shown by the evidence is his work as a captain’s mate, some of which experience included duties as a research assistant to marine scientists. The letter dated September 25, 2003 from the petitioner’s owner stresses the importance of the beneficiary’s experience in the fields of biology and chemistry. But the evidence fails to establish the level of beneficiary’s knowledge of those fields or the extent of his experience working in those fields. Although the beneficiary’s written statement contains a broad reference stating that “during this five year plus period” of work as a seaman and captain’s mate he gained experience and education in science, the beneficiary does not claim that he was working in a scientific field for that whole five-year period. Rather, the beneficiary cites only his work with a marine biology institute as evidence of his experience in a field of science. That work occurred only during the final four months of the beneficiary’s career as a captain’s mate, from February to June 1982. Moreover, the beneficiary does not assert that he worked full-time in a field of science during that four-month period, but only that his duties as a captain’s mate on a research vessel “included that of a research assistant to the scientists on board who were performing various biological research studies.” The beneficiary goes on to explain, “The research studies included the chemical analysis of water conditions and various effects upon sealife, fish, etc.” (Beneficiary’s statement, June 5, 2003, at 2-3).

The beneficiary’s statement therefore establishes only that he had some experience in the field of marine biology. That field cannot reasonably be considered to be one related to the offered job of farmer (grape grower). The duties of the offered position as stated on the ETA 750 include the following: “Plants and cultivates vines and harvests crops (grapes), applying knowledge of varieties, soil, climate and market conditions; Determines when to plant, prune, cultivate and irrigate plants, based on knowledge of vine-crop culture; attaches farm implements to tractor, drives tractor in fields to till soil.” (ETA 750, block 13). The beneficiary’s experience in marine biology is not reasonably related to the duties of the offered position as stated on the ETA 750. Moreover, the beneficiary’s statement establishes only four months of marine biology experience, on an unspecified part-time basis.

In his letter dated September 25, 2003, the petitioner’s owner describes the complexities involved in growing grapes on a commercial basis. As evidence of those complexities, the petitioner submits copies of a soil report and of several invoices for plant and fertilizer products purchased by the petitioner. But the complexity of vineyard grape growing is not in dispute in the instant petition. The issue is whether the beneficiary’s experience is related to the offered job of farmer (grape grower). The petitioner’s evidence fails to establish that the beneficiary’s experience is related to the offered position. Moreover, even assuming that the beneficiary’s

experience is in a related occupation, the evidence fails to establish that the beneficiary had the minimum experience of two years and six months in such an occupation, as required by the ETA 750.

In his decision, the director correctly summarized the evidence concerning the beneficiary's experience, and concluded that the evidence failed to establish that the beneficiary's experience was in a field related to the offered job. The director's analysis of that issue was correct. The director failed to note that the beneficiary did not claim more than four months working in a field related to the offered job and did not claim that his work in a scientific field was full time during those four months. But those errors did not affect the director's decision, since the grounds cited by the director were sufficient reasons to deny the petition. The decision of the director to deny the petition was therefore correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of the petitioner's owner on appeal and the evidence newly-submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). As noted above, the priority date in the instant petition is April 19, 1999. The proffered wage as stated on the Form ETA 750 is \$275.00 per week, which amounts to \$14,300.00 annually.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 19, 1999 the beneficiary claimed to have worked for the petitioner beginning in May 1994 and continuing through the date of the ETA 750B, in the position of grounds keeper. No evidence in the record establishes the amount of compensation paid by the petitioner to the beneficiary during the period beginning on the priority date of April 19, 1999 and continuing until the present. Moreover, since the beneficiary's position as groundskeeper is a different position from the offered position of farmer (grape grower), any payments made to the beneficiary for his work as a groundskeeper would not help to establish the petitioner's ability to pay the proffered wage to the beneficiary for work as a farmer (grape grower).

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a partnership. Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below."

Where a partnership has income from sources other than from a trade or business, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1.

In the instant case, the petitioner's tax returns show income from sources other than from a trade or business. Therefore the figures for net income are shown on the Schedule K's. The petitioner's tax returns show the following amounts for income on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1: -\$313,868.00 for 1999; -\$407,456.00 for 2000; -\$451,069.00 for 2001; and -\$578,849.00 for 2002. Since each of those figures is negative, those figures fail to establish the ability of the petitioner to pay the proffered wage.

It should be noted that the petitioner's tax return for 2001 is marked as a final return, and that the return in the record for 2002 is for a different partnership with a different employer identification number. The name of the partnership on the 2002 return is "Lieb Family Limited Partnership" (hereinafter referred to as the family partnership). The record lacks evidence to establish that the family partnership is a successor in interest to the petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a partnership taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17. If a partnership's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$18,835.00 for the beginning of 1999; -\$107,848.00 for the end of 1999; -\$100,386.00 for the end of 2000; zero for the end of 2001 (the final return under the petitioner's name); \$286,819.00 for the beginning of 2002 (based on the return of the family partnership); and \$431,998.00 for the end of 2002 (based on the return of the family partnership). The figures for the beginning of 1999, for the end of 1999 and for the end of 2000 are negative, and the figure for the end of 2001 is zero. Therefore those figures fail to establish the ability of the petitioner to pay the proffered wage in 1999, 2000 or 2001. Although the figures for the beginning of 2002 and the end of 2002 are greater than the proffered wage, the return for 2002 is for the family partnership, and the evidence fails to establish that the family partnership is a successor in interest to the petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481.

For the foregoing reasons, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In summary, the evidence fails to establish that the beneficiary had two years and six months of experience in a field of science related to the offered job as of the priority date. Beyond the decision of the director, the evidence fails to establish the petitioner's ability to pay the proffered wage during the relevant period.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.